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No. 524. October Term, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF OPELIKA,

Appellant,

vs.

OPELIKA SEWER COMPANY,

Appellee.

Appeal from the District Court of the United States for the Middle District of Alabama.

BRIEF FOR APPELLEE.

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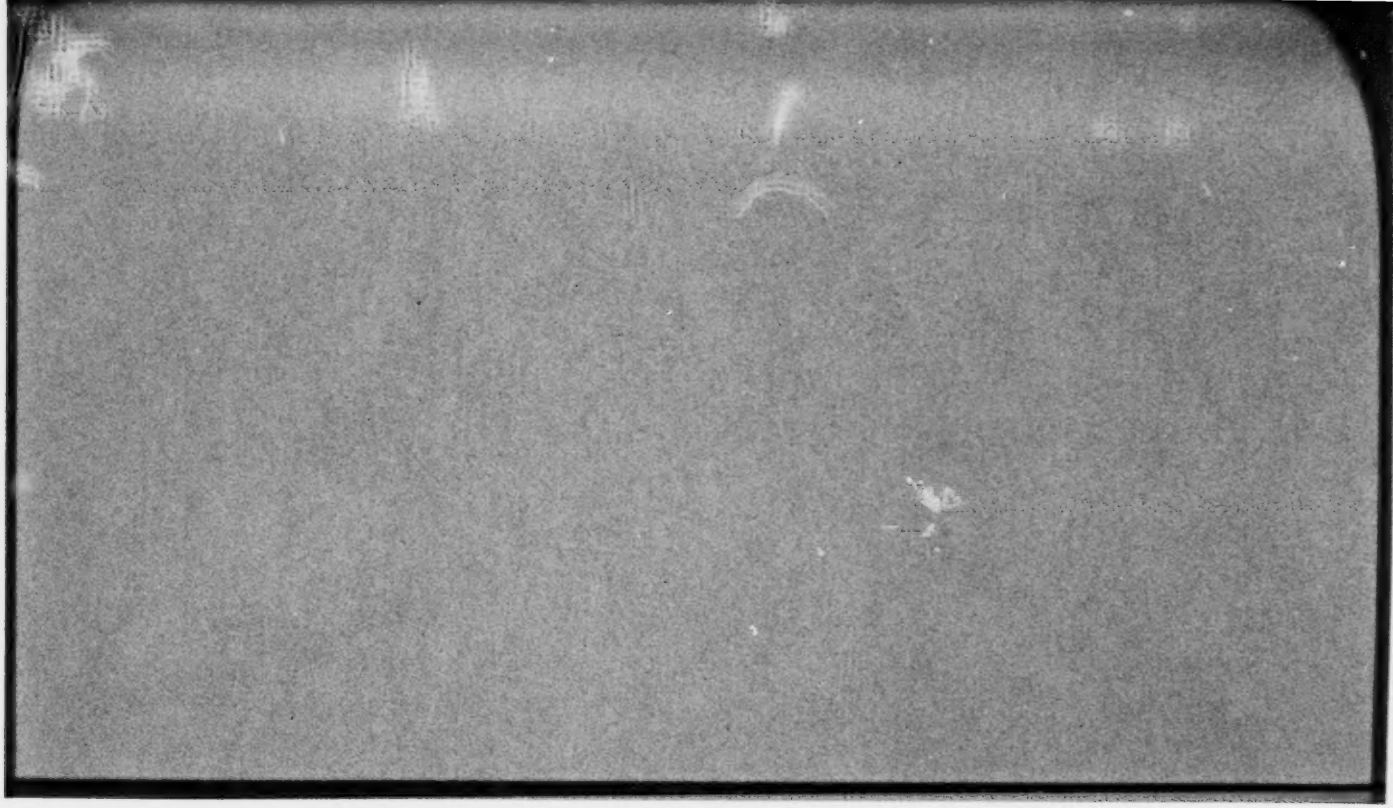

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IN THE

Supreme Court of the United States

October Term, 1923. No. 524.

CITY OF OPELIKA,
Appellant,

vs.

OPELIKA SEWER COMPANY,
Appellee,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal by the City of Opelika from the Decree of the District Court granting an injunction against the City restraining it from enforcing the rates for sewer service specified in the ordinances of said City adopted November 19, 1901, amended April 22, 1902, granting a franchise to the Company to construct, operate and maintain a sanitary sewerage system in said

City for a period of thirty years, and Section 6 thereof provided that the sewer Company was "authorized to charge not in excess of the following annual rates for sewerage service, which said rates may be collected quarterly in advance", following which is a schedule of maximum rates (Record, pp. 6-12). The Appellee Sewer Company thereafter constructed and has since operated and maintained a sewerage system serving said city and its inhabitants charging the rates specified in the ordinance until January 1, 1922, resulting in a loss, the actual operating expenses greatly exceeding the gross receipts, although the system was managed and operated as economically as possible. The Company has been unable to pay the interest on its bonded indebtedness or to earn any dividends on its actual cash investment of $70,000 or on its capital stock of $50,000. In the suit brought by the appellee Company it was shown and not seriously denied by appellant that the rates prescribed in the ordinance of April, 1902, were confiscatory because inadequate for a fair return upon the reasonable value of the property employed in the service and that if compelled to continue the service under the rates named in the ordinance it would result in the taking of appellee's property without just compensation in violation of the Fourteenth Amendment of the Constitution of the United States. It further appeared that the appellee on November 23rd, 1921 (Record, p. 13) petitioned the City for permission to increase its rates so as to provide for a revenue commensurate with the service and to insure a fair return upon the Company's property, and set forth a schedule of new rates, which permission was denied by the City and the Company thereupon promulgated and put into effect the new rates alleged to be fair and reasonable to the City and its

inhabitants and necessary to the continued operation of the sewerage Company.

A special Master was appointed to take testimony as to whether or not the rates or charges were so low as to be confiscatory and he reported to the Court that the rates were confiscatory, which report was confirmed by the Court.

The appellant city contended that the franchise ordinance of April, 1902, constituted a valid and binding contract and that the rates therein stipulated cannot be changed without its consent.

The appellee company contended that the ordinance does not constitute a contract in so far as it relates to the rates for the reason that the city had no charter power to fix irrevocable rates by contract and even if the Legislature had granted such power, such grant is in conflict with Section 22 of the Constitution of Alabama, and therefore ineffective.

The argument of appellant on this appeal is based upon the same contention as in the Court below, to wit, that the franchise ordinance constituted a valid contract and the fact that the specified rates are confiscatory is not questioned. The City's sole contention is that the rates were fixed by contract and are therefore binding upon both parties for the entire term. The facts are clearly summarized in the opinion of the Court below reported in 280 Fed. 155 (Record, p. 75).

ARGUMENT.

The sole question involved is whether the City had the power to fix irrevocable rates by contract. On behalf of the appellee company it is contended that the franchise ordinance of 1901 did not constitute a contract between the city and the company in so far as it relates to the rates for sewerage service for the reason that:

(1) The City had no power to fix irrevocable rates by contract, and

(2) Even if the Legislature had attempted to grant such power, same would be ineffective because in violation of Section 22 of the Constitution of Alabama, as follows:

> "That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."

(1) The City had no power to fix irrevocable rates by contract.

Appellant's argument is based upon the theory that in granting the franchise to the appellee to construct and operate a sewer system and specifying the maximum rates, that the city was not acting in its governmental capacity, but in its private business capacity and argues that it could not have been acting in its governmental capacity because it has no power conferred upon it by the state to regulate rates. Appellant then assumes from such alleged lack of power that the city must have had the power to contract for irrevocable rates. The charter expressly grants to the city the power to establish and build sewers and regulate the same, which clearly includes the power to grant the franchise to a public utility company and to regulate the rates, but even if no express power to regulate rates is granted, it is manifest that to contract for irrevocable rates and thus surrender the police power to regulate for the benefit of the public cannot be inferred merely from the absence of an

express grant of power to regulate. Appellant city would have it appear that because the city may have no express grant of power to regulate rates in its governmental capacity that therefore it has absolute power to fix irrevocable rates by contract in its private business capacity. The fallacy of this argument is apparent and begs the entire question.

Furthermore the city in exercising the power granted in its charter to establish and build sewers and regulate same, and to maintain the health and cleanliness of the city and to this end to adopt and maintain an efficient system of sewerage, was clearly acting in its governmental capacity for the protection of the health of its inhabitants—exercising an express governmental power as provided in its charter.

The distinction is well established between the responsibility of cities for acts done in their public or governmental capacity and in the discharge of duties imposed on them by the Legislature for public benefit, and for acts done in what may be called their private or business character in the management of property and rights voluntarily held both for their own immediate profit or as a corporation although inuring, of course, ultimately to the benefit of the public.

1 Dillon's Municipal Corporations, 5th Ed. Sec. 109, and cases cited.

There can be no doubt that any exercise of the powers granted in its charter to provide an efficient sewerage system for the public benefit and protection of the health of its inhabitants, the City acted in its governmental capacity. 28 CYC, 267.

The preservation of the public health is uniformly recognized as one of the chief functions for the exercise of the police power, and is a most important municipal

function, and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality. 28 CYC. 709.

The distinction between the governmental function and the corporate or private business capacity of a municipality has frequently arisen in cases seeking to impose liability on a municipality for injuries caused in the exercise of such powers, and in the case of alleged liability from the operation of a sewer system, it is held that the city is not liable because of the negligent or careless manner in which it maintains its sewer system as the construction and maintenance of such system so far as concerns the general community at large is a governmental function, and in the absence of a violation or invasion of a property or contract right, no recovery can be had against the city.

4 Dillon on Municipal Corporations, 5th Ed., Sec. 1744, citing and quoting from Hughes vs. Auburn, 161 N. Y. 96, and many other cases.

A municipality is not liable for injuries in connection with sanitary regulations for the protection of the public health, as same is the exercise of a governmental or legislative function.

HOWARD vs. PHILADELPHIA, 250 Pa. 184 (1915).

This principle has been so long and so firmly established in our general municipal corporation law as to cause astonishment that it should even be raised at this late day save only to meet the exigency of an otherwise weak case.

The City charter is contained in the Act of the Legislature of Alabama approved February 20, 1899, (Record, pages 52 to 70), and provides that the City shall have full power and authority to "maintain the

health and cleanliness of the City, and to this end to adopt and maintain an efficient system of sewerage; to adopt such ordinances and regulations as the Board may deem necessary and expedient for the protection of health and to maintain a good sanitary condition in public places and on private premises in the City" (Record, p. 59), "to establish and build drains, sewers, acqueducts and reservoirs and to regulate the same," (Record, p. 60) and to "authorize the use of the streets of the city for horse, steam or electric railroads, and to regulate the same, and to attach conditions to any grant of franchises, and to compel such companies to have and keep in repair such parts of the streets, bridges and crossings over which their cars run, as the board may deem proper; to regulate the use of the street for erection of telegraph, telephone, electric and all other systems of wires and conduits, and to require same to be placed underground if deemed necessary for public convenience or safety".

These are the only powers relating to this subject which the Legislature granted or attempted to grant in the City charter and no other statutes are applicable thereto.

The well established rule is that if the rates fixed in a statute or ordinance are so inadequate that their enforcement would be equivalent to the taking of property for public use without just compensation to the owner they should not be observed because there must be afforded a fair return from the property at the time of its use for the public benefit.

NEWTON vs. CONSOLIDATED GAS CO., 258 U. S. 165, 66 L. Ed. 538.

KNOXVILLE vs. WATER CO., 212 U. S. p. 1, 53 L. Ed. 371.

WILCOX vs. CONSOLIDATED GAS CO., 212 U. S. 19, 53 L. Ed. 382.

DES MOINES GAS CO. vs. DES MOINES, 238 U. S. 153, 59 L. Ed. 1244.
DENVER vs. DENVER UNION WATER CO., 246 U. S. 178, 62 L. Ed. 649.
LINCOLN CAR CO. vs. LINCOLN, 250 U. S. 256, 63 L. Ed. 968.

In HOME TELEPHONE CO. vs. LOS ANGELES, 211 U. S. 265, 53 L. Ed. 176; it appeared that a franchise for fifty years was granted by an ordinance stipulating for certain free telephone service to the city and that charges for service should not exceed certain specified amounts. The City attempted to reduce the rates which the Company claimed could not be done without its consent as the ordinance constituted a valid contract and to change the rates would impair the obligation thereof in violation of the Federal Constitution. It was held that the City did not have the power to enter into a contract fixing unalterably during the term of the franchise the charges for telephone service. This Court in an opinion by Mr. Justice Moody said:

> "This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter 'power of regulation'? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the au-

thority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in cert in well-defined cases it may be made legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this Court, which will be referred to hereafter.

It has been settled by this Court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' Street R. Xo., 184 U. S. 368, 382, 46 L. Ed. 592, 605, 22 Sup. Ct. Rep. 410; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508, 51 L. Ed. 1155, 1160, 27 Sup. Ct. Rep. 762. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, 955."

Later, in applying the rule thus expressed as to power to fix street railway rates in Milwaukee Electric Railway vs. Railroad Commission, 238 U. S. 174, 59

L. Ed. 1254, it was held the power to establish prices to be charged by public service corporations is a governmental power and is interpreted as continuing in nature and incapable of being bartered away. The settled federal rule is exacting and need not be misunderstood. It requires that the intent of the statute to authorize a municipality to exercise such power *by contract* must appear in explicit and convincing terms. In that case, Mr. Justice Day said:

> "It has been uniformly held in this court that the renunciation of a sovereign right of this character must be evinced by terms so clear and unequivocal as to permit of no doubt as to their proper construction."

In KNOXVILLE WATER CO. vs. KNOXVILLE, 189 U. S. 434, 47 L. Ed. 887, the water company was granted a franchise to erect water works and supply the city with water for thirty years, provision being made for certain specified maximum rates. Some years later the city passed an ordinance reducing rates which the Company declined to accept and the city brought an action to recover penalty for charging and collecting rates in excess of those fixed by the later ordinance, which involved the question whether the old rates could be reduced. It was held that the power of a municipality to enter into an irrevocable contract fixing rates to be charged by a water company in effect removed same from the supervision of the police power and in order to do so there is no question but that the legislative grant of power must be unquestionable and admit of no other construction, but must be plain, positive and unequivocal.

In the case at bar the charter of the City of Opelika contains no grant of power to fix irrevocable rates and no other legislative provision appears which grants

any such power to the city, and under the above authorities, same cannot be implied, but must be plain, positive and unequivocal. Under the powers granted in the charter the city could build and maintain a sewerage system which, of course, included the right to grant a franchise so to do to the appellee company, but the city had no power to fix the rates irrevocably and the schedule of rates therein specified were subject to regulation and the sovereign power so to do was never surrendered or suspended.

Appellant in attempting to show the alleged power of the city to contract for irrevocable rates relies on the case of Detroit vs. Detroit Street Railway Co., 184 U. S. 368, 46 L. Ed. 592; and Cleveland vs. Cleveland Street Railway Company, 194 U. S. 517, 48 L. Ed. 1102.

In the Detroit case the Railway Company could not construct a railway through the streets of the city without the consent of the municipality which was empowered to make such regulations and impose terms and conditions for so doing upon the railway company. It appeared, however, that the power of the city to fix the rates by contract was expressly granted by the Street Railway Act which provided that the rates of fare which any street railway may charge for the transportation of passengers over its road should be established *by agreement* between the company and the corporate authorities of the city where the road is located and should not be increased without the consent of such authorities. Express power was thus granted the city to fix the rates by agreement or contract.

In Cleveland case the statutes of Ohio required written application to be made by the railway company for leave to construct and operate a street rail-

road, etc., and then provide that no street railroad grant shall be made except to the corporation *that will agree* to carry passengers upon such proposed railroad at the lowest rates of fare for a period of twenty-five years. It was held that this granted power to the city to fix the rates of fare by contract. Therefore, those cases are clearly distinguished for the reason that the power which is lacking in the case at bar was expressly granted to the cities in these cases.

Appellant also places great reliance upon and quotes extensively from the decision of this Court in COLUMBUS RAILWAY & LIGHTING CO. vs. COLUMBUS, 249 U. S. 399; 63 L. Ed. 669 (1919), where the Railway Company sought to be relieved from the provisions of a franchise ordinance granting it the right to operate a street railway for twenty-five years at certain specified rates of fare which the company alleged had become insufficient to provide a fair return on its property and hence confiscatory due to extraordinary war conditions. The city contended that the ordinance created a binding contract and that the Company was bound to furnish at the rate of fare fixed and had failed to show that the conditions amounted to a legal impossibility of performance of such contract. This contention was sustained by this Court and it was held that the franchise ordinance constituted a valid contract, but the decision depended and rested entirely upon the statutes of Ohio, which granted express power to cities to so contract, being the same statutes which ruled the Cleveland case (supra). These statutes provided that street railway grants should only be made by cities to companies that would agree to carry passengers at the lowest rates of fare, for a period of 25 years. This situation

is clearly stated by this Court in its opinion by Mr. Justice Day, as follows:

> "Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question.
>
> It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this Court in Cleveland v. Cleveland City R. Co., 194 U. S. 517; 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the Court."

and then proceeds to discuss the Cleveland case.

Of course, in the case at bar no such statutory provision exists and no such power was vested in the municipality and in none of those cases did the Constitution of the State contain a prohibition such as that in the Constitution of Alabama forbidding the grant of irrevocable franchises and privileges. Can it be doubted that even if the Legislature had passed a law in Alabama similar to the Ohio statutes which ruled the above cases, that same would have violated Section 22 of the Alabama Constitution?

Appellant quotes at length and seemingly relies a great deal on the case of MUSCATINE LIGHTING CO. v. MUSCATINE, 256 Fed. 929 (D. C. Iowa, 1919), having entirely overlooked the fact that this case was argued on appeal with the case of the Southern Iowa Electric Co. vs. Chariton, and the decision of the District Court reversed by this Court upon the precise point in 255 U. S. 539; 65 L. Ed. 764; both of which cases will be referred to hereafter as absolutely sustaining our contention that the attempt on the part

of the City of Opelika to fix irrevocable rates in this franchise ordinance is in violation of Section 22 of the Alabama Constitution.

Appellant also relies on the case of BIRMINGHAM WATERWORKS CO. v. BIRMINGHAM, 211 Fed. 497 (D. C. Ala. 1913), and seeks to apply the ruling there made in reference to the Charter of the City of Birmingham to also govern the Charter of Opelika in the present case. The City Charter in that case empowered the City to make any needful provisions for the water supply and the Court finally reached the conclusion that the power to contract should be implied therefrom, together with the power to contract for rates. The alleged contract was attacked on the ground that the rates fixed were so low as to be confiscatory and in violation of the Fourteenth Amendment to the Federal Constitution, and also that the ordinance impaired the obligation of such contract. However, the first ground was not stressed and the Court expressly held that there had not been sufficient presentation of that phase of the case to justify a ruling thereon. Furthermore, the franchise was granted for a period of thirty years under Section 228 of the Constitution of Alabama which permits franchises for such period by cities of over 6000 inhabitants. This can have no application whatever to the City of Opelika as admittedly it has less than 6000 inhabitants. It further appears that Section 22 of the Constitution prohibiting any irrevocable grants was not referred to or considered by the Court. In addition, this case was decided in 1913, long before the changed condition of affairs due to the World War had brought about so many later decisions of this Court upon this subject referred to in this brief. In view of these facts, especially the failure to discuss or apply Section 22 of the

Constitution of Alabama, this case can have but little if any bearing upon the present discussion.

In KNOXVILLE GAS CO. vs. KNOXVILLE, 261 Fed. 283 (C. C. A. Tenn. 1919), the situation was almost identical with the case at bar, the controlling question being whether the city possessed the power by contract irrevocably to fix the maximum price for gas for a term of fifty years. Authority to make price by contract or even by way of regulation touching the supply of gas was nowhere expressed among the municipal powers, and the claim of power in the city to agree upon a price for gas rested chiefly on the right created in the city in general language to impose terms and conditions for its consent to the use of the highways, rather than upon any language expressly authorizing it either to regulate prices or to agree upon a price. After a full review of the authorities it was held that the power to fix rates to be charged by the public service corporations was governmental and resides primarily in the State and municipalities cannot exercise such power unless the State has in fact surrendered its power in that behalf. It is the settled Federal rule that a State surrender to a municipality of power irrevocably to fix rates for a public service corporation must appear in express and convincing terms; all doubtful expressions are to be resolved in favor of the State against the surrender of the power. No such power being delegated to the city, hence the franchise ordinance specifying the rate cannot in that respect be enforced by the city when by reason of changed conditions such rate was not compensatory, and the Gas Company was granted an injunction restraining the city from the enforcement of such rates.

We submit therefore that under these authorities and the admitted facts it is beyond question that the

City of Opelika wholly lacked the power to fix irrevocable rates by contract for sewerage service and that the ordinance in question did not and could not constitute a binding contract as to rates. And this is so even without reference to the prohibition of the Constitution of Alabama which removes all doubt if any could exist, and renders any such attempt to fix irrevocable rates nugatory.

(2) Had the power to fix rates by contract been expressly granted to the City it would be ineffective as in violation of Section 22 of the Constitution of Alabama, as follows:

> **"That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities shall be passed by the Legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."**

Under this provision of the Alabama Constitution neither the Legislature nor its creature, the City of Opelika, could make any irrevocable or exclusive grants of special privileges or immunities, and even if the charter of the city had contained an express grant authorizing the city to fix rates irrevocably, any attempted exercise of such power, as the city now contends was done in the franchise ordinance here involved, would have been in violation of the constitutional provision and null and void. The Supreme Court of Alabama in discussing this provision held that this power can neither be abdicated nor bargained away, and it is inalienable even by express grant, and all franchises and property rights are held subject to its fair exercise. The municipality cannot in the exer-

cise of its delegated contractual right, perpetually or for an unreasonable length of time, fasten on the inhabitants rates and obligations that cannot be changed or regulated so as to meet changed conditions and thereby avoid extortion and oppression.

Referring to Section 22 of the Constitution, Judge Clayton, in his opinion in this case in the Court below, at page 160, 280 Fed., said:

> "If, however, the Legislature had granted or attempted to grant such power to the municipality as here claimed, manifestly, its act would have been in violation of Section 22 of the Constitution of Alabama, which provides:
>
> 'That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.' "

The language employed in this provision of the fundamental law of the State is comprehensive, and its purpose as well as its meaning is plain. The Supreme Court of Alabama in discussing this provision, intimated, in some of its decisions, that legislative power might be granted to contract for fixed rates for a reasonable period, but in City of Mobile v. Mobile Electric Co., 203 Ala. 574, 84 South. 816, considering the power to make grants and contracts of this character, declared that:

> "This power can neither be abdicated nor bargained away, and it is inalienable, even by express grant; that all contracts and property rights are held subject to its fair exercise."

In the former appeal of this case, 201 Ala. 607, 79 South. 39, L. R. A. 1918F, 667, the Court said:

> "The municipality cannot, in the exercise of its delegated contractual right, perpetually or for an unreasonable time fasten upon the taxpayers and inhabitants rates and obligations that cannot be changed or regulated during reasonable intervals so as to meet changed conditions and thereby avoid extortion or oppression."

BIRMINGHAM COMPANY vs. BIRMINGHAM, 79 Ala. 465.

There the Supreme Court of Alabama so construed Section 23 of the Constitution of 1875, a companion of Section 22 of the present Constitution, and it was held that neither the Charter of the City of Birmingham nor the general statutes conferred on that corporation the power to grant by ordinance in the nature of a contract the exclusive franchise in perpetuity for running a street railway through certain of the streets and avenues of the city and that if any such power was granted by the charter or any statute that it would be a violation of that constitutional provision against the passage of any law making any irrevocable grant of any special privileges or immunities. In the case of New Decatur v. Telephone Co., 176 Ala., at page 497 (1912), the Court says: "In our Constitution of 1875 there was added to the section (now Section 22, Constitution 1901) that no ex post facto law nor any law impairing the obligations of contracts shall be passed, this additional clause "or making any irrevocable grants of special privileges or immunities shall be passed by the General Assembly." This being a prohibitive law on the power of the Legislature, necessarily carries with it a like prohibition as to the law-

making power of every municipal corporation, the creature of the Legislature. Subsequent to the adoption of said Constitution every ordinance of a municipal corporation in the exercise of its legislative powers, must be construed as if that section of the Constitution was written into it."

In SAN ANTONIO TRACTION CO. vs. ALTGELT, 200 U. S. 304, 50 L. ed. 491, a similar provision of the Texas Constitution of 1876 was under consideration. In 1899 the city granted a franchise to the railway company providing that it should charge five cents fare for one continuous ride, and thereafter in 1903, the Legislature of the State passed a new act requiring street railways to issue and sell half fare tickets for school children. The City of San Antonio sought to compel the railway company to issue and sell such tickets, the company contending that the ordinance providing the five cent fare was a contract and that this later statute reducing the fare impaired the obligation thereof in violation of the Federal Constitution. This Court held that it was not necessary to determine whether or not the ordinance constituted a contract for even assuming that it was a valid contract, it was still subject to the constitutional provision that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made and all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

This provision is substantially the same as that of the Alabama Constitution in the case at bar, and the Court in holding that it made such a contract unenforceable, if it was a contract, used this language (p. 308).

> "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise

of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which, in Sec. 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof."

"An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the Legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the Legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises."

The appellant city in the present case fails to show that it had legislative authority to make the contract it alleges was made with the company because the inhibition of the Constitution against irrevocable grants of privilege stands squarely in the way and as stated by this Court, in the above case, it becomes unnecessary to consider whether such a contract was in fact made.

The appellant also contends that even if there be an exercise of excess powers a contract pro tanto never-

theless exists, and cites the case of City of Manitowoc vs. Manitowoc Traction Company, 145 Wis. 25, and Milwaukee vs. Railroad, 153 Wis. 592, where the construction of the Wisconsin statutes was involved and the Court held that such an ordinance did not constitute a contract. The Milwaukee case was appealed to the U. S. Supreme Court, 238 U. S. 174, 59 L. ed. 1254, and the judgment of the State court was affirmed as being the judicial interpretation of a State statute by the highest court of the State, holding that there was no contract made by the passage and acceptance of the ordinance.

The latest case in this Court on the subject is SAN ANTONIO vs. SAN ANTONIO PUBLIC SERVICE CO., 255 U. S. 547, 65 L. Ed. 777 (1921), affirming the judgment of the District Court, 257 Fed. 467, where the railway company filed its bill complaining that it was unable to earn a fair return on its investment unless permitted to charge a greater fare than five cents as fixed by the city's ordinance, the city having passed a new ordinance prohibiting the company from raising its rates without the city's consent and that the enforcement of the ordinance prevented the company from increasing its rate of fare to seven cents and thereby deprived it of its property without due process of law in violation of the Federal Constitution. The city moved to dismiss the bill on the ground that the five cent fare ordinance constituted a valid contract and therefore the action of the city in refusing to permit the company to raise its fare could not be a taking of its property without due process of law. It was held that the District Court had jurisdiction to enjoin the city from enforcing the five cent fare ordinance and that such ordinance did not constitute a valid contract and that the enforcement thereof was beyond the

powers of the city because the rate being admittedly confiscatory, the enforcement would violate the Fourteenth Amendment. It was further decided that such ordinance was not and could not be a valid contract in view of the provision of the Texas Constitution prohibiting irrevocable or uncontrollable grants of privileges which we have seen in the Altgelt case, supra, is almost exactly the same as that of the Alabama Constitution in the present case. Mr. Chief Justice White delivered the opinion of the Court, and said (p. 555):

> "That, in view of the admitted fact of confiscation, the Court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate,—a result of which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract,—it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.
>
> Primarily, the answer to that question must depend upon whether the Ordinance of 1899, fixing the 5 cents rate, was a contract. That it is not and could not be we are of opinion, as the necessary result of Sec. 17, Article 1, of the State Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges', etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the Ordinance of 1899 to give it the contract consequence relied upon. Indeed, this result is persuasively established by the ruling in the Altgelt case, to the effect that *if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right*

inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

And in SOUTHERN IOWA ELECTRIC COMPANY vs. CITY OF CHARITON, and MUSCATINE LIGHTING CO. v. MUSCATINE (decided and reported together), 255 U. S. 539, 65 L. Ed. 764, suit was brought by the Electric Company engaged in supplying electricity under an ordinance conferring a franchise for twenty-five years containing a schedule of maximum rates. After being in effect for some years, suits were brought to prevent the enforcement of the maximum rates specified on the ground that the same were so unreasonably low that the continued enforcement thereof would result in the confiscation of the property without due compensation in violation of the Federal Constitution. The city contended that the ordinance constituted a contract and the court below so held, which, on appeal to the Supreme Court, was reversed, the sole question being the existence of a binding contract as to the rates which were said to be confiscatory and cannot be enforced unless they are secured by a contract obligation. The solution of this question depended upon the power of the city to contract. If such power existed, it must have been conferred by the Iowa Code, Sec. 725, granting to the city power to require a public utility corporation, subject to reasonable rules and regulations, to furnish any person applying therefor along its lines with gas, water, light or power and to supply the city with water for fire protection, etc. and to fix rates for water, gas, heat and electric light or power "and these powers shall not be abridged by ordinance, resolution or contract."

Held that the power thus conferred is a continuing one and could not be abridged or bartered away by contract or otherwise. This Court followed the ruling of the Supreme Court of Iowa construing this section and held the power thus conferred a continuing one that could not be abridged or bartered away by contract or otherwise. Mr. Chief Justice White in applying the provision of the Statute said (p. 546):

> "The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed in enforcing such rates upon the theory of the existence of the contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the State law and of the rule of public policy announced by the court of last resort of the State is urged by municipal corporations whose every power depends upon the State law." Citing numerous cases.

And so in the case at bar there is a total lack of power conferred upon the appellant city to contract for rates for sewer service, and therefore the franchise ordinance was not intended to be and could not be a valid contract fixing irrevocable rates, especially in view of the constitutional provision which the attempted grant of any such power to contract would clearly violate. In this connection it is to be noted that the City Charter provides that the city may contract for maximum rates on light, water and heat to private consumers, but totally lacks any such provision

regarding sewers, and we contend that any attempt to exercise such an alleged power with respect to water, light and heat rates would also be in violation of the Constitution; but the absence of any such provision regarding sewers makes it absolutely certain that the city had no power to fix rates therefor by contract and the legislature never intended to attempt to grant such a power or otherwise it would have been easy to use the same language which was used in reference to the rates for light, water and heat.

In DENVER vs. STENGER, 277 Fed. 865 (C. C. A. Colo. 1922), the Court construed the Constitution of Colorado providing against the grant of irrevocable privileges, franchises and immunities and the effect of certain franchise ordinances specifying street railway fares. The company contended that such rates of fare were confiscatory and would not permit a reasonable and fair return for the use by the public of the property of the company. As in the case at bar, the evidence in regard to the confiscatory character of the rates was not seriously disputed, but the city contended that the ordinance constituted a valid and binding contract in relation to the fares and therefore the question as to whether or not the rates were confiscatory was immaterial, claiming that the acceptance by the company of such franchise ordinance bound the company. The company insisted that there was no power in the city to make such contract and therefore same was unenforceable. The ordinance granting the company a right of way on the city streets to build its railway and provided that it should be entitled to receive a fare of 5 cents and no more for a single passage, etc. Subsequently the city enacted another ordinance fixing a half fare for children and the trial court enjoined such rates which were shown to be confiscatory. The company

contended that the previous ordinance constituted a contract and that the city could not reduce the rates. The Court held that the provision of the constitution clearly prohibited the making of a contract suspending the power of the city to regulate the fares.

The effect of similar constitutional provisions of the States of Texas, Missouri, Louisiana and Iowa are also cited and it is conclusively demonstrated that the section of the Alabama Constitution we are now considering which is more comprehensive than these other provisions, necessarily has the same prohibitive effect.

Appellant's argument attempts to distinguish the case of Denver v. Stenger, supra, from the other cases the court below cites on the ground that the ordinances in question in that case "were not contractual in form or in substance", but neither is the ordinance of the City of Opelika contractual in form or in substance, but is the usual franchise ordinance in such cases, granting authority to build and operate a sewer system and the provision as to the rates is that the "Sewer Company is hereby authorized to charge not in excess of certain rates" (Record pp. 9 and 12). The mere fact that the ordinance contains a provision that upon acceptance of its terms and conditions by the company it shall be a contract between the parties, of course, does not make it a contract legally, as the parties could not change the legal effect by their own mere statement; neither could they supply a want of power in the city to make such a contract. Such a proposition is too plain for argument. Even if the parties intended that it should have the effect of a contract, this would not change the situation, for if the city lacked the power to fix irrevocable rates by contract, then it is manifest that the parties themselves could not create such power by their own agreement, especially where the attempted

exercise thereof is expressly prohibited by the Constitution of the State.

Suppose the Legislature of Alabama had passed a statute expressly authorizing the City of Opelika and other cities in the State of the same class to grant franchises for the construction and operation of gas, water, light, street railway and sewer service and to fix irrevocable rates and charges for same for a period of thirty years; clearly such an act would be in direct violation of the Constitution of Alabama and null and void, and the municipality would have no power under such an act to fix irrevocable rates. And what the Legislature could not do, manifestly the city could not accomplish by attempting to fix irrevocable rates by its ordinance granting a franchise to construct and operate a sewer system, even under the form and guise of an alleged contract. If the Legislature was without power to thus override the Constitutional provision, as it unquestionably was, certainly the municipality, a mere creature of the State, wholly lacked the power to fix irrevocable rates, and the attempt to do so indirectly by an ordinary franchise ordinance is wholly ineffective.

What was said by this Court in the concluding paragraph of the San Antonio case, 255 U. S., at page 558, meets exactly the situation we have in the case at bar. Mr. Chief Justice White said:

> "The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. Home Teleph. & Teleg.

Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50, and cases cited; Milwaukee Electric R. & Light Co. vs. Wisconsin R. Commission, 238 U. S. 174, 180; 59 L. ed. 1254, 1260, P. U. R. 1915 D, 591, 35 Sup. Ct. Rep. 820."

There are two classes of decided cases with distinction clearly marked:

(1) Where a municipality has express legislative authority to contract for public utilities, and to fix rates by contract—as in the Columbus case, cited supra, the parties are bound for the term of their contract.

(2) Where a municipality has no express legislative power to contract for public utilities or to fix rates, or where the powers of the Legislature are restrained by Constitutional limitation as in the San Antonio case, no contractual relation can exist for any fixed period and the rates specified may be changed if found to be either exorbitant or confiscatory.

We respectfully submit that the instant case is clearly in class 2 and therefore the judgment of the District Court should be affirmed.

WM. FINDLAY BROWN,
Attorney for Appellee.

FILED
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WM. R. STANS
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant*,

vs.

OPELIKA SEWER COMPANY, *Appellee*.

Appeal from the District Court of the United States for the Middle District of Alabama.

Brown Printing Co., Montgomery

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1923.

No. 524.

CITY OF OPELIKA, *Appellant,*

vs.

OPELIKA SEWER COMPANY, *Appellee.*

Appeal from the District Court of the United States for the Middle District of Alabama.

MOTION OF APPELLANT TO ADVANCE CASE.

Comes the City of Opelika, appellant, and moves the court to advance this case, and in support of its motion makes the following brief statement of the matters involved, with the reasons for the application:

BRIEF STATEMENT OF MATTERS INVOLVED.

The appellee Sewer Company brought a suit of injunction in the District Federal Court in Alabama

against the appellant City of Opelika, and sought to enjoin the City from enforcing the rates and charges for sewer service rendered by the Sewer Company to the City of Opelika, and its inhabitants, and to have such rates and charges cancelled and annulled and a new schedule of maximum rates or charges for sewer service put into force and effect. The sole equity of the bill was that the rates or charges for sewer service were so low or small as to be confiscatory, and to compel the Sewer Company to perform the service for such charges would be to deprive it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. The theory and contention of the Sewer Company in the trial court was that the City of Opelika had, in the exercise of its governmental or legislative powers and functions, fixed the schedule of maximum rates or charges in question for the sewer service, and that such rates or charges were law fixed rates and were so low as to be confiscatory and therefore in violation of the Federal Constitution. Appellant, the City of Opelika, defendant in the court below, disputed and denied all of the asserted equities in appellee's bill of complaint. It moved the trial court to dismiss the bill of complaint upon the ground that it, together with its exhibits, affirmatively showed upon its face that the maximum rates sought to be annulled, from the enforcement of which the defendant was sought to be enjoined, were not law fixed rates, but were contractual rates, agreed to by and between the appellant and appellee and their respective predecessors in title and in right, and hence that such rates could not be confiscatory in the sense that a State law was in violation of the Fourteenth Amendment to the Federal

Constitution; that the bill of complaint, together with its exhibits, affirmatively showed on its face a lack of equity, and that it showed that the City of Opelika had never had conferred upon it any power to fix maximum or other rates or charges for public sewer service or other public utility; that in fixing the rates and charges in question it was exercising its business, private or proprietary power or function, and not its legislative or governmental power or function; that the ordinance franchise (See pp. 6 to 13 printed record) which contained the schedule of rates and charges complained of, showed upon its face that it was a contract between the Sewer Company and the City of Opelika; that the contract was based upon a sufficient and adequate consideration; that it was binding upon both parties; that the City not only had never had conferred upon it the power to fix rates or charges for sewer service, but had not even attempted so to do in ordaining the ordinance franchise in question.

The trial court having overruled the motion to dismiss because the bill of complaint showed no equitable cause of action and showed that no Federal question was involved or presented to the court for decision, the City then answered the bill of complaint at length, denying all of the asserted equities, setting out all the facts and circumstances showing that the rates or charges in question were contractual and not law fixed; that the particular schedule of rates and charges complained of was proposed by the Sewer Company and that these rates or charges were agreed to by the City of Opelika and thereafter embraced in the franchise ordinance in consideration that the

Sewer Company would construct, operate and maintain a sewer system for the City of Opelika and its inhabitants; that such ordinance franchise contract was entered into and performed by both parties for eighteen or nineteen years without complaint; that the franchise ordinance in question provided for its own forfeiture or termination and conferred upon the City of Opelika the option to purchase the plant and works of the Sewer Company at the end of ten years, and that it was in all things a binding contract and was not a law fixed rate.

The charter of the City of Opelika, which was an Act of the Legislature of Alabama incorporating the City and conferring upon it its rights, powers, privileges, and imposing upon it certain duties as a municipality, was introduced in evidence, and which contains no express power or authority for the City of Opelika to fix rates or charges for any public utilities, but did confer authority and power to provide such public utilities or to contract with third parties to provide and operate such utilities, and as a necessary consequence of such power it had the power to agree by contract upon rates or charges for such public service.

The case was submitted on these issues, a special master was appointed to take evidence as to whether or not the charges were confiscatory, evidence was taken and the special master reported back to the court his findings to the effect that the rates were confiscatory. The court affirmed the report of the special master, granted the relief prayed, thereby annuling the rates which had prevailed for eighteen or nineteen years, enjoined the City of Opelika from enforcing

them, and allowed the Sewer Company to impose and collect rates and charges exactly twice the amount of the rates so annulled, and in effect required the City of Opelika and its inhabitants to pay such rates and charges exactly double the amount which had theretofore prevailed. From that decree the City of Opelika prosecutes this appeal.

REASONS FOR THE APPLICATION.

Since the decision and decree of the trial court, and pending this appeal, the City of Opelika and its inhabitants are, by the decree of the court, required to pay exactly double the amount for sewer service rendered by the appellee Sewer Company and for which it had contracted to furnish such service, and for which it had furnished such service for eighteen or nineteen years.

The City of Opelika had no authority or power, under its charter or other laws of the State of Alabama, to fix rates or charges, and the court has no power and authority to compel it to agree to the rates and charges thus imposed upon the City and its inhabitants by the trial court.

The City of Opelika, having no authority or power, and no such duty ever having been imposed upon it by the Legislature to fix rates, neither the State nor Federal court has the power or authority to compel it to agree to other rates and charges than those which had been voluntarily fixed by contract.

The injunction and other bonds made and executed by the Sewer Company to indemnify or hold the City

of Opelika and its inhabitants harmless against injury or loss, are wholly inadequate unless this appeal can be disposed of at the earliest practicable time by this court; and the pendency of this appeal for a long time would probably result in great damage and inconvenience to the City of Opelika and its inhabitants as to which compensation and remuneration could not be had after the final disposition of this case.

For these reasons the appellant, the City of Opelika, respectfully and earnestly prays this court to advance this case and to give it consideration and decision as soon as is practicable under the rules and practice of this honorable court.

Respectfully submitted,

CITY OF OPELIKA.

By N. D. DENSON & SON,

DICKINSON & DICKINSON,

J. J. MAYFIELD.

The Opelika Sewer Company, by its attorneys, Steiner, Crum & Weil and Barnes & Walker, hereby acknowledges service upon it of a copy of the above motion to advance this case, together with brief statement of matters involved and reasons for the application.